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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

PAZ R. HERNANDEZ,

Petitioner

v.

THE TRAVELERS INSURANCE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SOUTHERS, MENDELSOHN, GOLDBERG & LYONS, INC.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

PAZ R. HERNANDEZ,
Petitioner

v.

THE TRAVELERS INSURANCE COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Paz R. Hernandez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding February 19, 1974.

OPINION BELOW

The opinion of the Court of Appeals is reported at 489 F. 2d 721; the denial of petitioner's application for rehearing en banc is reported at 493 F. 2d 664.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 19, 1974. A timely petition for rehearing en banc was denied on

April 16, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a workmen's compensation case is a "direct action" against the insurer of a policy of liability insurance, pursuant to 28 U.S.C. §1332(c)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V

> "No person shall ... be deprived of life, liberty or property without due process of law;..."

STATUTE

United States Code, Title 28:

> §1332. Diversity of citizenship (c)...in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

STATEMENT OF FACTS

Petitioner, Paz R. Hernandez, a Texas citizen, sued respondent, The Travelers Insurance Company, a corporation incorporated in the State of Connecticut with its principal place of business in Hartford, Connecticut, to enforce his legal rights pursuant to the Texas Workmen's Compensation Act. Respondent had issued a policy of workmen's compensation insurance to its insured and petitioner's employer, Parker Transportation Company, a sole proprietorship owned by J. F. Parker, a Texas citizen.

Parker was not made a party because, under Texas law, petitioner has no right of action against his subscriber-employer and must seek compensation only from the insurance carrier. Tex.R.Civ.S., Art. 8306, §3. On the contrary, in States such as Tennessee the employee may sue his employer, the insurance carrier or both. General Accident Fire & Life Assurance Corp. v. Kirkland, 356 S.W.2d 383 (Tenn.Sup. 1962); Douglas v. Sharp, 249 S.W.2d 999 (Tenn.Sup. 1952).

The trial court, Hon. D.W. Suttle, Western District of Texas, denied respondent's motion to dismiss and granted an interlocutory appeal to the Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1292(b). The Fifth Circuit reversed and rendered a final judgment, dismissing petitioner's cause of action, on the sole ground that a workmen's compensation case was a "direct action" and that Congress chose to remove all direct actions from diversity of jurisdiction. The Court of Appeals, held, in effect, that notwithstanding the judicial principle that the grant or restriction

of federal diversity jurisdiction will be limited strictly to the historical legislative purposes of Congress, since Congress did not exclude workmen's compensation from the restriction, it must, therefore, be included.

REASONS FOR GRANTING THE WRIT

The Petition raises substantial and important questions concerning the proper administration of diversity jurisdiction statutes in the federal courts. The Supreme Court has not yet assigned meaning to the 1964 amendment to 28 U.S.C. §1332(c), which precludes jurisdiction to a direct action against certain insurers. The meaning assigned by the court below, in disregard of the intent of Congress expressed by the legislative history and prior opinions of this Court, requires dismissal of this and all similar workmen's compensation cases pending in federal courts throughout the United States. Thus, all such injured workmen are left without a remedy since the time has passed to file a new action in state court.

The holding below, that a workmen's compensation case is a direct action, is in direct conflict with holdings of the First and Sixth Circuits that Congress excluded only those cases arising under a Louisiana or Wisconsin type "direct action" statute permitting suit against either the insurer or the insured. White v. United States Fidelity and Guaranty Company, 356 F. 2d 746 (1st Cir. 1966); Henderson v. Selective Insurance Company, 359 F. 2d 143 (6th Cir. 1966). If not in direct conflict, the Fifth Circuit

statement that "Congress chose to remove all direct actions from diversity jurisdiction," notwithstanding the legislative history which explains that there is only one kind of direct action, places the Fifth Circuit in conflict in principle with the First and Sixth Circuits.

By expanding a specific restriction to diversity jurisdiction beyond the historical intent of Congress, the Fifth Circuit conflicts with Supreme Court opinions relating both to workmen's compensation and jurisdiction generally and engages in judicial legislation in derrogation of the legislative purposes of diversity jurisdiction. The result reached is that diversity jurisdiction is denied the injured worker but is available to the insurer, which never was intended by Congress. The opinion below is so erroneous that the Supreme Court should exercise its supervisory powers to review and correct the grevious injustice perpetrated by the Fifth Circuit.

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER MEANING TO BE ASSIGNED 28 U.S.C. §1332(c).

In White v. United States Fidelity and Guaranty Company, 356 F. 2d 746 (1st Cir. 1966) and Henderson v. Selective Insurance Company, 369 F. 2d 143 (6th Cir. 1966) the First Circuit and Sixth Circuit held that the legislative purpose of Congress in using the words "direct action" was exactly as stated

by the United States Senate in its report, as follows:

> "The purpose of the proposed legislation is to amend §1332(c) of title 28 United States Code, so as to eliminate under the diversity jurisdiction of the U.S. district courts, suits on certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly against the foreign insurance carrier without joining the local tort-feasor as a defendant." (emphasis added) S.Rep.No. 1308, 88th Cong., 2d Sess. 1, U.S. Code Cong. & Admin. News 1964, p. 2788 (1964).

The First Circuit reasoned that the legislative history made clear that the words "direct action" were used to refer to statutes such as those in Louisiana and Wisconsin which allow a party injured by the negligence of an insured to pursue his right of action against the insurer alone. White v. United States Fidelity and Guaranty Company, 356 F. 2d 746 (1st Cir. 1966). The reasoning of the Sixth Circuit concurred, the court stating that the 1964 amendment was enacted to remedy a situation arising in the states of Wisconsin and Louisiana as a result of the enactment of "direct action" statutes in those states permitting suits directly against the insurance companies without joining the insured. Henderson v. Selective Insurance Company, 369 F. 2d 143, 149 (6th Cir. 1966).

On the contrary, the court below, without once reciting or paraphrasing the legislative history of the 1964 amendment, held that Congress intended to remove all direct actions from diversity jurisdiction, relying upon the reasoning of a Tennessee district court which, also, never recited the legislative history of the statute. Vines v. United States Fidelity and Guaranty Company, 267 F. Supp. 436 (E.D.Tenn. 1967). Like the plaintiff in White v. United Stated Fidelity and Guaranty Company, 356 F. 2d 746 (1st Cir. 1966), the court below considered the statute as if there were no clear legislative purpose. As opposed to the reasoning of the First Circuit and Sixth Circuit, recognizing the congressional intent for the deliberate use of the adjective "direct," the court below finds no special meaning to it as a word of art in law.

Since all three cases do not relate to workmen's compensation, the conflict, at least, is in principle involving an important matter of federal jurisdiction law which the Supreme Court should decide, i.e., the meaning to be assigned to "direct action" in 28 U.S.C. §1332(c). Shapiro v. United States, 335 U.S. 1, 4 (1947) and see Minnesota Mining Company v. New Jersey Wood Company, 318 U.S. 311, 318 (1965). The rights of all workmen's compensation claimants in federal courts throughout the State of Texas and the other 49 states hinge upon the proper meaning to be assigned to "direct action" in the diversity statute. Massachusetts Trustees v. United States, 377 U.S. 235, 237 (1964), and

see Maryland v. United States, 381 U.S. 41, 43 (1965). Therefore, a need for uniformity exists as to what is and what is not a "direct action." Commissioner v. Bilder, 369 U.S. 499, 501 (1962).

2. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE UNITED STATES SUPREME COURT AS TO THE PROPER MEANING TO BE ASSIGNED TO JURISDICTION STATUTES.

The Fifth Circuit defiantly refused to administer the principles articulated by the Supreme Court in Horton v. Liberty Mutual Insurance Company, 367 U.S. 348 (1961) that jurisdiction will be denied only when Congress specifically bars the filing or maintaining of a particular suit in federal court. Congress specifically barred removal of workmen's compensation cases in 1958 and left unchanged language permitting original filing of such suits, which Congress very easily could have changed. Therefore, the Supreme Court held, as follows:

> "... we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. ... Horton v. Liberty Mutual Insurance Company, 367 U.S. 348, 354 (1961).

The holding in Horton v. Liberty Mutual Ins. Co., supra., is that diversity jurisdiction will not be declined unless explicitly denied by Congress in light of legislative history. The court

below, responding in a jurisprudential vacuum, without resort to the meaning of legislative history, concluded that Congress chose to remove all "direct actions," notwithstanding the obvious fact that legislative history made clear that there was only one kind of "direct action."

3. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING PROBLEM CONCERNING EFFORTS TO INVOKE AND CREATE FEDERAL DIVERSITY JURISDICTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE SUPREME COURT.

The Fifth Circuit, by erroneously assigning meaning to "direct action" in the 1964 amendment to 28 U.S.C. §1332(c), requires the dismissal of this case and all similar workmen's compensation cases pending in federal courts. Since numerous cases are pending in lower courts which will be affected by the opinion below, it is desirable for the Supreme Court to make an early definitive ruling on the jurisdiction issue. United States v. Standard Oil Company, 332 U.S. 301, 302 (1947); United States v. Powell, 330 U.S. 238 (1947).

By holding that a workmen's compensation case is a direct action and that workmen's compensation insurance is liability insurance, pursuant to the 1964 amendment, the court below has so far departed from the accepted and usual course of assignment of meaning to statutes as to call for an exercise of the Supreme Court's powers of supervision. Jurisdiction statutes are to be strictly construed to give effect to the intent of Congress manifested by histor-

ical legislative purposes stated in the legislative history. Healy v. Rata, 292 U.S. 263 (1934); Liberty Mutual Insurance Company v. Horton, 275 F. 2d 148, 154 (5th Cir. 1960) aff'd. Horton v. Liberty Mutual Insurance Company, 367 U.S. 348 (1961).

This Court has held repeatedly that to assign meaning properly to any statute, courts should construe the language to give effect to the intent of Congress as reflected by the legislative history. United States v. Wise, 370 U.S. 405 (1962); Commissioner v. Bilder, 369 U.S. 499 (1962); United States v. American Trucking Association, 310 U.S. 534 (1940). The court below construed the 1964 amendment so as to frustrate clear cut purposes forcibly expressed by both friend and foe of the legislation at the time of its adoption since only direct action statute cases were considered. First National Bank of Logan, Utah v. Walker Bank & Trust Company, 385 U.S. 252 (1966).

Therefore, the Fifth Circuit has departed from the usual course of judicial proceedings to the extent that the result reached below is judicial legislation. This result has been achieved because the Fifth Circuit has taken the words "direct action" and "policy of liability insurance" from their context and with them thus isolated has attempted to determine their meaning, which is an improper method of statutory interpretation. United States v. American Trucking Association, 310 U.S. 354 (1940); see also Ferguson v. Skrupa, 372 U.S. 726 (1963).

The result reached by the court below is absurd or, at least, unreasonable, United States v. American Trucking Association, 310 U.S. 534 (1940), involving

invidious discrimination against the workmen's compensation claimant. A federal forum is available to the insurer-plaintiff, as in Atlantic Mutual Insurance Company v. Mitchell, 333 F.Supp. 70 (N.D. Tex. 1971), but it is denied to the working man.

Such discrimination violates the due process clause of the Fifth Amendment to the United States Constitution, Bolling v. Sharpe, 347 U.S. 497 (1954); United States v. Pipefitters Local Union #562, 434 F. 2d 1116 (8th Cir. 1970); 16A C.J.S. Constitutional Law §558, and is not founded on a reasonable distinction or difference in state policy. Allied Stores v. Bowers, 358 U.S. 522, 528 (1959); Kahn v. Shevin, ___ U.S. ___, 40 L.Ed.2d 189 (1974). On the contrary, state workmen's compensation policy is to favor the working man, not the insurer. See Horton v. Liberty Mutual Ins. Co., 367 U.S. 348 (1961); Bogany v. Consolidated Underwriters, 252 F. 2d 764 (5th Cir. 1958).

Finally, this Court should grant the petition, at least, to rule prospectively since petitioner and others have relied on the language of the statute to seek federal court jurisdiction and are without a forum as denied by the Fifth Circuit. McSpanan v. Weist, 402 F. 2d 867 (3rd Cir. 1968); Esposito v. Emery, 402 F. 2d 879 (3rd Cir. 1968). See also Great No. Ry. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932).

CONCLUSION

The Supreme Court should review this

case because it has not yet assigned meaning to the 1964 amendment to the diversity statute and because the meaning assigned by the court below is in derrogation of the intent of Congress expressed by legislative history and prior opinions of the Supreme Court, as well as being in conflict with the First Circuit and Sixth Circuit. For the reasons stated above, it is respectfully requested that this petition for a writ of certiorari be granted.

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APPENDIX I

INDEXED

Paz R. HERNANDEZ, Plaintiff-Appellee,

v.

The TRAVELERS INSURANCE COMPANY, Defendant-Appellant.

No. 73–1226.

United States Court of Appeals, Fifth Circuit.

Feb. 19, 1974.

A workmen's compensation claimant who was a citizen of Texas and was employed by a Texas resident sued his employer's workmen's compensation insurer which was incorporated in Connecticut and had its principal place of business there. In the United States District Court for the Western District of Texas, at San Antonio, Dorwin W. Suttle, J., a motion by the insurer for dismissal for want of subject matter jurisdiction was denied, and the insurer appealed. The Court of Appeals, Wisdom, Circuit Judge, held that, under a statute, the insurer was to be deemed a citizen of the state of which the insured employer was a citizen, and that there was thus no diversity jurisdiction.

Reversed and remanded with directions to dismiss complaint.

1. Courts ⇐314(4)

In enacting statute providing that in direct action against insurer, insurer is deemed citizen of state of which insured is citizen, Congress intended that whenever party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the other's liability insurer without joining insured and without having first obtained judg-

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ment against insured, insurer shall be deemed citizen of state of which insured is citizen as well as of any state by which insurer has been incorporated and in which it has its principal place of business. 28 U.S.C.A. § 1332(c).

2. Courts ⇐314(4)

Workmen's compensation policy indemnifying employer was a "policy or contract of insurance" within federal statute providing that in any direct action against insurer on policy or contract of liability insurance, insurer shall be deemed citizen of state of which insured is citizen, for purposes of determining diversity of citizenship. 28 U.S.C.A. §§ 1332, 1332(c), 1445.

See publication Words and Phrases for other judicial constructions and definitions.

3. Courts ⇐314(4)

Action by workmen's compensation claimant against insurance carrier of claimant's employer was "direct action" against insurer within federal statute providing that in such instances insurer is deemed citizen of state of which insured is citizen, for purposes of determining whether diversity exists. 28 U.S.C.A. § 1332(c); LSA–R.S. 22:655; W.S.A. 204.30(4), 260.11(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Courts ⇐314(4)

Where workmen's compensation claimant sued employer's workmen's compensation insurer directly and claimant and his employer were both Texas citizens, there was no diversity jurisdiction, though insurer was incorporated in Connecticut and had its principal place of business there; action was "direct action" within federal statute. 28 U.S.C.A. § 1332(c); Vernon's Ann.Civ.St. art. 8306, § 3.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge:

The defendant-appellant, Travelers Insurance Company, brings this interlocutory appeal under 28 U.S.C. § 1292(b) from the denial by the district court of Travelers' motion to dismiss for want of subject matter jurisdiction. The question for decision is whether in a direct action by an employee against his employer's workmen's compensation insurer, the insurer shall be deemed a citizen of the state of which the employer is a citizen for purposes of determining whether diversity of citizenship jurisdiction exists. We hold that in such cases a workmen's compensation insurer should be deemed a citizen of the state of which the insured is a citizen, and accordingly we reverse.

The plaintiff-appellee, Paz R. Hernandez, is a citizen of Texas. He sustained the injuries involved in this suit while he was working for the Parker Transport Company, a proprietorship wholly owned by J. F. Parker. Parker d/b/a Parker Transport Company, and Contractors Hauling, Inc., a Texas corporation wholly owned by Parker, are the named insureds under Workmen's Compensation and Employer's Liability Policy No. UB4801599, issued by Travelers. Both Parker and Contractors Hauling, Inc., are citizens of Texas. Travelers is incorporated in Connecticut and has its principal place of business there.

The case turns on a 1964 amendment to the diversity of citizenship jurisdictional statute, 28 U.S.C. § 1332(c). The amendment added the following proviso:

> That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

If this proviso applies to suits brought by a workman against his employer's workmen's compensation insurer, then Travelers in this suit must be deemed a citizen of Texas, and there is no diversity jurisdiction. If not, of course, Travelers must be deemed a citizen of Connecticut, and there is diversity jurisdiction.

We have found no circuit court decision in point. The United States district court for the Eastern District of Tennessee, however, has twice considered the precise question at issue here, and both times has held that a suit by a workman against his employer's insurer was a "direct action against the insurer of a policy or contract of liability insurance" within the meaning of § 1332(c). Vines v. United States Fidelity & Guaranty Co., D.C.1967, 267 F.Supp. 436; Lane v. Insurance Company of North America, D.C.1967, 268 F.Supp. 345. In *Vines*, the court found first that a workman's compensation insurance policy was a "policy or contract of 'liability insurance' ":

> The term "liability insurance" is applied to contracts which provide for indemnity against liability. Zieman v. United States Fidelity & Guaranty Co. of Baltimore, 214 Iowa 468, 238 N.W. 100. Liability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries sustained by others, Cushing v. Maryland Casualty Company, (C.A. 5, 1962) 198 F.2d 536, or in a broader sense, against loss or liability on account of injuries to property. State ex rel. Travelers Indemnity Company v. Knott, 114 Fla. 820, 153 So. 304, 155 So. 115. A policy of liability insurance is a policy that indemnifies against the condition of becoming liable. Graves v. National Mutual Casualty Company, 164 Kan. 267, 188 P.2d 945; Dunn v. Jones, 143 Kan. 218, 53 P.2d 918.

267 F.Supp. at 437. The *Vines* court next found that a direct action against the insurer on the workmen's compensation policy, allowed by Tennessee's workmen's compensation law,

was a "direct action" within the meaning of the 1964 amendment.

The court therefore held that it had no jurisdiction over a suit precisely analogous to the case at bar.

[1–3] We agree with the reasoning of the Tennessee district court:

> Congress intended that wherever a party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the other's liability insuror [sic] without joining the insured and without having first obtained a judgment against the insured, the insurer shall be deemed a citizen of the State of which the insured is a citizen as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business, for the purposes of determining whether diversity jurisdiction exists.

Vines, 267 F.Supp. at 438–439. We agree, too, that a workman's compensation policy such as the one involved here is a "policy or contract of insurance" within the meaning of § 1332(c); and that an action such as this is a "direct action" within the meaning of that provision.

The appellee makes a single major argument in opposition to this conclusion. Travelers argues that Congress intended the 1964 amendment to be read in light of its history, and that it should therefore be limited by the conditions which led to its adoption. The 1964 amendment was a response to "direct action" statutes adopted in Louisiana and Wisconsin, allowing direct actions against liability insurers by persons injured in motor vehicle accidents. La.Rev.Stat.Ann. § 22:655 (1959); Wis.Stat. §§ 204.30(4), 260.11(1) (1963). The Supreme Court had held in Lumbermen's Mutual Casualty Co. v. Elbert, 1954, 348 U.S. 48, 75 S.Ct. 151, 99 L.Ed. 59, that in actions brought under these statutes, diversity jurisdiction existed as long as there was diversity of citizenship between the injured claimant and the insurer, regardless of the citizenship of the

insured. As a result of this decision, a large number of automobile accident cases were brought in the federal district courts in Louisiana, creating a considerable burden on the dockets of those courts, which in 1964 were the most crowded dockets in the nation. There is no doubt that the 1964 amendment was motivated by congressional concern over the crowded dockets in Louisiana. See S.Rep. 88–1308, in 1964 U.S.Code Cong. & Admin.News pp. 2778, 2779–2784; 1 J. Moore, Federal Practice and Procedure ¶ 0.77[4]; Weckstein, The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws, 1965 Wis.L.Rev. 268, 269–71. Reviewing this history, the appellee argues that Congress intended that the amendment should apply only to direct actions brought under statutes similar to the Wisconsin and Louisiana statutes—that is, statutes providing for direct actions in motor vehicle or in tort cases.

We cannot accept this argument. Whatever may have been the specific evil prompting congressional action in 1964, Congress chose to remove *all* direct actions from the diversity jurisdiction. The language of the statute is not subject to a limitation to motor vehicle cases, or to cases where the insured's liability is imposed by tort law. See *Vines*, 267 F.Supp. at 438.

If Congress had wished to limit § 1332(c) to tort actions or had wished to exclude workmen's compensation suits from § 1332, it would have been simple enough for it to have done so by appropriate language. Congress was familiar with the burden workmen's compensation cases imposed on federal courts. In 1958 it enacted 28 U.S.C. § 1445 prohibiting the removal of "a civil action in any State court arising under the workmen's compensation laws of such state". The Judicial Conference of the United States had recommended passage of the statute; the workload of federal courts had "greatly increased because of the removal of workmen's compensation cases from the State courts to the [district] courts". Quoted in S.Rep. 1830, 85 Cong. 2nd Sess., U.S.Code Cong. &

Admin.News p. 3105 (1958). Judge Estes has pointed out: "Workmen's compensation cases arise and exist only by the virtue of state laws. No federal question is involved and no law of the United States is involved in these cases." National Surety Corporation v. Chamberlain, D.C.1959, 171 F.Supp. 591. In that case the district court held that the statute imposed a jurisdictional bar to an action by an insurance carrier brought in the federal district court to set aside an award of the Industrial Accident Board. This Court, in a later case, overruled Judge Estes' ruling on the ground that it went beyond "the face of the act itself". If the intent of Congress had been to withdraw these cases from federal jurisdiction, it would have said so by the simple insertion of the words "or filed in the United States District Courts". Liberty Mutual Ins. Co. v. Horton, 5 Cir. 1960, 275 F.2d 148. The Supreme Court affirmed this Court in a five to four opinion, also stating: "In this situation, we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as the removal of such suits, and it could easily do so still." Horton v. Liberty Mutual Ins. Co., 1961, 367 U.S. 348, 81 S.Ct. 1570, 6 L.Ed.2d 890. Similarly, when the language of a congressional act is plain and specific, courts have no more license to shorten the reach of the act than to lengthen it.

[4] Travelers also argues that the proviso to § 1332(c) does not apply because under Texas law, the injured employee is *not* allowed to sue his *employer* directly, but is instead relegated to an action against the insurer. His remedy is before the Texas Industrial Accident Board; and in judicial review proceedings after the board has acted, the parties are the employee and the insurer, not the employer. See Vernon's Ann.Tex.Rev.Civ.Stat., art. 8306, § 3. This fact does not change our conclusion, however. Indeed, the Texas law goes further than a "direct action" statute, which simply permits a

suit against the insurer, without joining the insured. The action in Texas against the insurer is still a "direct action", as we conceive it; the workmen's compensation context in Texas is still one where, in the words of the *Vines* court, "a party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the other's liability insur[e]r without joining the insured and without having first obtained a judgment against the insured".

Beyond this, the appellee relies upon a number of cases holding the 1964 amendment inapplicable. All of these cases are inapposite. Two of them[1] involved suits by the *insured*, not an injured party, against an insurer, seeking declaratory relief to determine the extent of coverage under a liability policy. Two others[2] involved suits by either the insured or an injured party against the insurer, not on the primary liability, but for failure to settle within policy limits. Three others[3] involved actions on uninsured motorists policies; these cases hold, correctly, that an uninsured motorists is not a "policy or contract of *'liability* insurance' ". The last,[4] decided by the Eastern District of Tennessee, is a case holding the amendment inapplicable where an *insured* sued for the use and benefit of injured third parties.

Reversed and remanded with directions to dismiss the complaint.

1. White v. United States Fidelity & Guaranty Co., 1 Cir. 1966, 356 F.2d 746; Walker v. Fireman's Fund Ins. Co., D.C.Mont.1966, 260 F.Supp. 95.

2. Bourget v. Government Employees Ins. Co., D.C.Conn.1970, 313 F.Supp. 367; Walker v. Fireman's Fund Ins. Co., D.C.Mont.1966, 260 F.Supp. 95.

3. Adams v. State Farm Mutual Auto Ins. Co., N.D.Miss.1970, 313 F.Supp. 1349; Bishop v. Allstate Ins. Co., W.D.Ark.1970, 313 F.Supp. 875; Inman v. MFA Mutual Ins. Co., E.D.Ark.1967, 264 F.Supp. 727.

4. Carvin v. Standard Accident Ins. Co., D.C.Tenn.1966, 253 F.Supp. 232.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

PAZ R. HERNANDEZ,
Petitioner

v.

THE TRAVELERS INSURANCE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1974, 3 copies of the Petition For Writ Of Certiorari were mailed, postage prepaid, to Jerry A. Gibson, 1222 North Main Avenue, San Antonio, Texas, 78212, counsel for respondent.

_____
LES MENDELSOHN
702 San Antonio Savings Bldg.
San Antonio, Texas 78205

ATTORNEY FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-2026

PAZ R. HERNANDEZ,

Petitioner

v.

THE TRAVELERS INSURANCE COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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NOW COMES the Travelers Insurance Company, Respondent, and files this its Brief in Opposition to the Petition for Writ of Certiorari filed by Paz R. Hernandez, Petitioner, and in support of same would show unto the Court as follows:

1. THE DECISION OF THE COURT BELOW IS IN ACCORD WITH THE DECISION OF OTHER COURTS OF APPEAL AS TO THE PROPER MEANING TO BE ASSIGNED 28 U.S.C.A. Sec. 1332(c).

Petitioner admits that all of the reported decisions dealing with the question of whether or not a workmen's compensation case falls within Sec. 1332(c) agree that where an injured workman, who was employed by an employer of his own State, seeks to sue a foreign insurance company who wrote a policy of workmens compensation then no diversity jurisdiction exists. *Vines v. United States Fidelity and Guaranty Company*, 267 F. Supp. 436 (E.D. Tenn. 1967); *Lane v. Insurance Company of*

North America, 268 F. Supp. 345 (E.D. Tenn. 1967). The decision of the Court below, therefore, is in strict accord with all recorded authority on this subject.

Petitioner asserts that the decision in this case conflicts with the decisions in *White v. United States Fidelity and Guaranty Company*, 356 F. 2d 746 (1st Cir. 1966), and *Henderson v. Selective Insurance Company*, 369 F. 2d 143, 149 (6th Cir. 1966).

This appeal turns on whether the use of the word "direct action" in 28 U.S.C.A. Section 1332(c) is restricted to direct actions as authorized in automobile cases in Louisiana and Wisconsin. Neither the decision in *White* nor *Henderson* is supportive of Petitioner's claim. In *White* the Plaintiff was a party seeking to be declared an insured under an insurance policy. The Court in that case correctly deduced that the statute contemplated a situation where an injured third party seeks to recover his damages from the insurance company without first obtaining a judgment or seeking to impose liability upon the insured. The declaratory judgment action did not present such a situation and the court easily held that it was not within the terms of the statute. An analogous case is *Walker v. Fireman's Fund Insurance Company*, 260 F. Supp. 95, 96 (D.C. Montana 1966), wherein the Court "concludes that unless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed would be imposed against the insured, then the action is not a direct action. Here Walker seeks to impose duties upon Fireman's Fund because of the contractual liability assumed by it. This liability could not be asserted against Griel (tort feasor) and hence the action is not a direct action."

The *Henderson* opinion is very similar. There the injured persons first proceeded to judgment against the tort feasor. The Henderson case involved a situation where the judgment creditor of the tort feasor sued Selective Insurance Company to determine that it had insurance coverage under its policy for the tort feasor. This is clearly not a case where the injured party seeks to recover from the insurance company without first obtaining a judgment against the tort feasor. Furthermore, in *Henderson* they were seeking to determine contractual liability which was a different cause of action from that against the tort feasor.

The Court below accepted the definition of a direct action used in *Vines:*

> ". . .Congress intended that where ever a party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the others liability insuror (sic) without joining the insured and without having first obtained a judgment against the insured, the insurer shall be deemed a citizen of the State of which the insured is a citizen as well as of any state by which the insurer has been incorporated and of the State where it is has its principal place of business, for the purposes of determining whether diversity jurisdiction exists."

Travelers submits that the decision of the court below is not in conflict with *Henderson* or *White* either in terms of the exact language or the spirit of the law. The courts in *Henderson* and *White* did not say that the only situation to which Sec. 1332(c) would apply would be cases such as in Louisiana and Wisconsin. The holdings of the court in *White* and *Henderson*

are consistent with the definition of direct action used by the court below.

2. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH LEGISLATIVE HISTORY AND THE DECISIONS OF THIS COURT.

Petitioner accuses the Fifth Circuit of deciding this case in a "jurisprudential vacuum" without resort to legislative history. A reading of the opinion makes it clear that the court was very much aware of the legislative history urged upon it by Petitioner. The opinion also makes it clear that the court was giving life to the actual words used by Congress. In so doing the Court below was consistent with the admonition of this court:

> "We must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth." *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961).

In this instance Congress spoke of any direct action against the insurer of a policy or contract of liability insurance. The term "liability insurance" is all inclusive. If the Congress had intended to restrict the applicability of this statute to the automobile cases arising out of Wisconsin and Louisiana which are the subject of much of the legislative history, the statute could easily have been worded to refer to "any direct action against the insurer of a policy or contract of automobile liability insurance." This Congress did not do. The obvious meaning of the statute is that it shall apply to any direct action upon any type of liability insurance.

It is now undisputed in this appeal that the court below correctly construed the policy of workmen's compensation insurance to be one within the definition of liability insurance. *Cushing v. Maryland Casualty Company*, 198 F.2d 536, (5th Cir. 1952); *Vines v. United States Fidelity and Guaranty Company, supra.; Lane v. Insurance Company of North America, supra.*

Travelers submits that its interpretation of the amendment to 28 U.S.C.A., Section 1332(c) restricting the jurisdiction of Federal District Courts in workmen's compensation cases is entirely consistent with the policy of Congress in past enactments. Probably the most explicit example of Congressional intent to reduce the involvement of Federal District Courts in workmen's compensation litigation is the amendment to 28 U.S.C.A. Section 1445(c) enacted in 1958 which states:

> "A civil action in any state court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

Thus began the tortured history of Congress' attempt to restrict the involvement of federal district courts in workmen's compensation litigation. One of the first cases construing the amendment to section 1445(c) was *National Surety Corporation v. Chamberlain*, 171 F. Supp. 591 (N.D. Texas, 1959). In this case, an insurance carrier brought suit to set aside the award of the Industrial Accident Board in Federal District Court. The employee had also brought an action to set aside the award in the State District Court. The Federal District Court held that it was without jurisdiction and engaged in a fairly complete synopsis of the congressional intent to restrict jurisdiction of

workmen's compensation cases. Judge Estes referred to S. Rep. No. 1830, 85th Cong., 2d. Sess. 3105 (1958) stating that the Judicial Conference of the United States recommended passage of the bill "to decrease the workload of Federal courts" which has "greatly increased because of the removal of workmen's compensation cases from the state courts to the district courts." Citing the same report the court said "Workmen's compensation cases arise and exist only by the virtue of state law. No federal question is involved and no law of the United States is involved in these cases." Judge Estes went on to say that "It is certain that Congress did not intend the Federal Court to have jurisdiction in a case such as this."

However, in an identical and later case, the Fifth Circuit Court of Appeals ruled in effect that Judge Estes had overstepped his bounds by not staying with the language of the statute and by trying to read into the statute another element. In a strongly worded opinion in *Liberty Mutual Insurance v. Horton*, 275 F2d 148 (5th Cir. 1960), the court reacted to the above quoted statements from Judge Estes and said that it:

> "Flies in the face of the act itself, limiting its reach to removal cases, and is, therefore, mere fiating. In short, Congress has withdrawn removal cases concerning workmen's compensation laws from federal jurisdiction. Congress was aware that certain workmen's compensation suits are filed in federal courts, under state laws, as original actions. If the intent of Congress had been to withdraw these cases also from federal jurisdiction, it could have said so by the simple insertion of the words 'or filed in the United States District Courts.' It is highly improper to extend such exclusion without Congressional act."

This case found its way to the Supreme Court of the United States in *Horton v. Liberty Mutual Insurance Co., supra.* In a five to four opinion, the decision of the Fifth Circuit was affirmed. The court first reviewed the Congressional history and the intent of the Congress to restrict workmen's compensation cases in the federal district courts. Referring to this history as "appealing considerations" the Court nevertheless ruled that the district court had overstepped its bounds by expanding the force of the statute to cases not involving removal.

Travelers submits that Congress did exactly what this court suggested and has effectively foreclosed workmen's compensation suits where there is no diversity of citizenship between the employer and his employee. This distinction is clearly grounded by a Congressional policy that in suits involving liability matters where the injured party and the insured are of the same state, there is little or no reason for the federal district courts to undertake diversity jurisdiction. However, the Congress carefully preserved diversity jurisdiction in situations where the employee and employer are citizens of different states. Apparently the Congress believed that in this situation there was a sufficient reason for preserving diversity jurisdiction.

If it was improper for Judge Estes in the *National Surety* case to extend the application of the removal statute, then it would be just as improper for this court to add language to the statute restricting it to automobile liability cases as in Louisiana and Wisconsin. The statute is broad and applies to all direct actions on all liability insurance policies. The facts in this case fit the statute like a glove.

3. THE JURISDICTIONAL STATUTE DOES NOT OFFEND DUE PROCESS.

Petitioner alleges that 28 U.S.C.A. Section 1332(c) violates due process because the federal courts are open to the insurance company but not the workman. None of the opinions or authority cited by Petitioner relate to jurisdictional matters or are authority in support of his proposition. Furthermore, Respondent submits that Petitioner's position is foreclosed by the language this court used in *Horton:*

> "Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still." (367 U.S. 348, 352).

Furthermore, the decision relied upon by Petitioner, *Atlantic Mutual Insurance Company v. Mitchell,* 333 F. Supp. 70 (N.D. Tex. 1971), is not well reasoned in that it deliberately ignores the realities of a workmen's compensation action. These realities were specifically relied upon by this court in *Horton,* which involved a question of jurisdictional amount. The Court took notice of the Texas practice that when an insurance company appeals an award of the Industrial Accident Board, the mere act of filing an appeal in a court of competent jurisdiction divests the Industrial Accident Board of jurisdiction and sets aside the award of the Industrial Accident Board. Trial is de novo on the workman's compulsory counterclaim and without reference to the decision of the Industrial Accident Board. *Commercial Standard Insurance Co. v. Cotton,* 443 S.W.2d 423 (Tex.Civ.App. – Eastland, writ ref'd, 1969); *Booth v. Texas Employers' Insurance Association,* 132 Tex. 237, 123 S.W.2d

322 (Com., opinion adopted by Sup. Ct. 1939). Both of these cases have Texas Supreme Court authority.

In *Horton* the insurance company filed an appeal and it was then encumbent upon the workman to counterclaim for his damages. The court noted that the counterclaim was in excess of the jurisdictional amount and, cognizant of the realities of the situation, ruled that that was sufficient to invoke the jurisdiction of the court. Similarly, in the situation where an appeal is filed by the insurance company, the real matter in controversy is the suit by the injured workman. Such a claim is a "direct action" within the terms of 28 U.S.C.A. Sec. 1332(c). There shouldn't be any difference in the jurisdiction of the Federal Courts, no matter which party appeals.

Respondent notes that this case which Petitioner relies on is a unique and isolated decision resting on no legal authority. *Mitchell* was a memorandum decision and has not been cited or relied upon by any other court. Nor has any court of appeals ruled in accord with *Mitchell* since the enactment of the amendment to 28 U.S.C.A. Sec. 1332(c). Furthermore, the reasoning of this case which Petitioner asserts as authority is only the reasoning of one judge since no cases from Texas or any other state were cited as a basis for this opinion.

In summary, the authorities cited by Petitioner do not support his proposition and the alleged constitutional argument is strictly boot strap and insubstantial.

4. PROSPECTIVE OVERRULING WOULD BE IMPROPER

In a single paragraph, Petitioner urges this court to rule

prospectively on this jurisdictional matter. The cases cited by Petitioner do not support this proposition. It is the duty of the court to enforce the Congressional act. There either is or is not jurisdiction. Petitioner alleges that he has relied on the language of the statute. If so, such reliance was misplaced and certainly against all the existing authority at the time this suit was filed.

5. CONCLUSION

Respondent submits that the Petition for Writ of Certiorari should be denied because the decision of the Court below is correct and the Petition for Writ of Certiorari does not raise any substantial questions to be decided by this court.

Respectfully Submitted,

WILEY, PLUNKETT, GIBSON & ALLEN

BY: _____
JERRY A. GIBSON

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have this 14 day of August, 1974, been mailed to Mr. Les Mendelsohn, 702 San Antonio Savings Building, San Antonio, Texas 78205.

BY: _____
JERRY A. GIBSON
ATTORNEY FOR RESPONDENT